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No. 04-1236

In The

# Supreme Court of the United States

TONY GOODMAN,

*Petitioner*

v.

STATE OF GEORGIA, *et al.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## REPLY BRIEF FOR PETITIONER GOODMAN

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## REPLY BRIEF FOR PETITIONER GOODMAN*

The proper result in this case follows straightforwardly from *Tennessee v. Lane*, 541 U.S. 509 (2004). Like the access-to-courts context addressed in *Lane*, the prison context is one in which provisions of the Constitution other than the Equal Protection Clause impose "affirmative obligations," *id.* at 532 – including the obligation to provide accommodations – on States in their treatment of individuals with disabilities. As shown in our opening brief, this Court has repeatedly held that the State's total control over daily human needs of inmates imposes on the State correlative affirmative duties under the Eighth Amendment and other constitutional provisions. Even more than in the access-to-courts context, the prison context is one in which there is a longstanding and continuing record of state violations of the constitutional rights of individuals with disabilities. Also more significantly than in *Lane*, the ADA requirement of "reasonable" modifications, 42 U.S.C. § 12131(2), takes account of the unique exigencies of the prison setting, and the limitations on inmate suits under legislation such as the Prison Litigation Reform Act (PLRA) further protects state prerogatives.

In their effort to justify invalidating Title II of the ADA in the prison context, respondents attempt to revive a number of arguments that this Court rejected two Terms ago in *Lane*. Only by ignoring the rationale and holding of *Lane*, and disregarding and distorting the legislative and judicial record here which exceeds that found sufficient in *Lane* and earlier cases, can respondents contend that the ADA exceeds Congress's prophylactic power under Section 5 of the Fourteenth Amendment to deter unconstitutional state treatment of inmates with disabilities.

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* On October 11, 2005, Justice Kennedy granted a motion for the instant brief to exceed by 10 pages the otherwise applicable limit of 20 pages under Rule 33.1(g)(vii) to reply to respondents' 71-page substantive appendix filed along with their brief.

The fatal flaws in respondents' arguments under this Court's precedent are particularly evident in light of the record in this case. This record involves claims by an inmate, who respondents describe as a "paraplegic," Resp. Br. 2, who alleges he was confined to a cell too small for a wheelchair to turn around, with inaccessible sanitary facilities. Respondents concede that the allegations underlying those claims, if supported at trial, would make out a violation of the Eighth Amendment. Resp. Br. 18.[1] Because of the long history of state violations of the constitutional rights of inmates with disabilities, and the carefully calibrated nature of the congressional response, Title II of the ADA is proper enforcement legislation insofar as it applies to the entire "class of cases," *Lane*, 541 U.S. at 531, brought by inmates with disabilities. But even if this Court were to conclude that Title II is not constitutional when considered for that class of cases, the statute would clearly be valid remedial legislation on the record here, where the very acts alleged to violate the statute also would violate the plaintiff's constitutional rights. *See City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

## I. TITLE II OF THE ADA IS REASONABLE PROPHYLACTIC LEGISLATION TO ADDRESS PERVASIVE CONSTITUTIONAL VIOLATIONS AGAINST INMATES WITH DISABILITIES

### A. Respondents Are Wrong That Only Rational-Basis Review Governs Here

1. Respondents argue (at 10-19) that this case is just like *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), because disability-based discrimination is subject to only rational basis scrutiny under the Equal Protection Clause, and many inmate claims are subject to the "reasonably

[1] Respondents repeatedly refer to claims seeking "access to public services, programs, and activities," *e.g.*, Resp. Br. 19, but their arguments ignore Goodman's central claims, which involve sanitation, mobility, and protection from physical injury.

related to legitimate penological interests" test of *Turner v. Safley*, 482 U.S. 78, 89 (1987). Respondents are incorrect. This case involves constitutional rights that impose more searching scrutiny on States than the rational basis test.

*Garrett* involved claims for reasonable accommodation in state employment. That context involves no fundamental rights, and is subject to scrutiny only under the Equal Protection Clause – and only under deferential rational-basis review at that. Accordingly, the Constitution imposes no obligation on a State to accommodate individuals with disabilities in employment; "[i]f special accommodations for the disabled are to be required, they have to come from positive law." *Garrett*, 531 U.S. at 368.

In *Lane*, by contrast, this Court upheld application of the ADA to "cases implicating the accessibility of judicial services," 541 U.S. at 531, because in that context the statute enforces not just the Equal Protection Clause's prohibition of irrational intentional discrimination but also "a variety of other basic constitutional guarantees," *id.* at 522. Those constitutional guarantees, such as the due process guarantee of a meaningful opportunity to be heard in a court proceeding, imposed "a number of affirmative obligations" on States – including the obligation to accommodate individuals with disabilities in connection with courthouses and judicial proceedings. *Id.* at 532-533.

As we showed in our opening brief (at 14-18), this is a case like *Lane*, and unlike *Garrett*, where the Constitution imposes affirmative obligations of accommodation on States. Because inmates are totally "dependent on the government's permission and accommodation" to satisfy their daily human needs, *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2121-2122 (2005), the Constitution imposes on States affirmative duties in the prison context. Failure to accommodate inmates' disabilities in some circumstances can constitute (and has frequently been held to constitute) "deliberate indifference to serious medical needs," *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), or "deliberate indifference to inmate health and safety," *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted),

that violates the Eighth Amendment. It can also constitute a denial of procedural due process or a violation of the First Amendment. *See* Goodman Br. 16-17, 18.

These affirmative state obligations reflect "basic constitutional guarantees, infringements of which are subject to more searching judicial review" than that imposed by the rational basis test. *Lane*, 541 U.S. at 522-523. When only the rational basis test applies, accommodation is virtually never required. A State "could quite hardheadedly – and perhaps hardheartedly" – refuse to provide an accommodation to its employees because of the incremental cost or burden attached to it. *Garrett*, 531 U.S. at 367-368; *see also Lane*, 541 U.S. at 547 (Rehnquist, C.J., dissenting) ("financial considerations almost always furnish a rational basis for a State to decline to make those alterations"). But a State cannot deny a wheelchair or accessible toilet to an inmate with a disability on the ground that those accommodations would cost some money, any more than it could deny an inmate needed medical care on that ground. *Cf. Estelle*, 429 U.S. at 103. Such a denial of accommodation, although "rational" for equal protection purposes, would nonetheless constitute cruel and unusual punishment. *See LaFaut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (Powell, J., sitting by designation).

Respondents' *amici* believe it critical that Eighth Amendment claims are not subjected to "the kind of strict scrutiny that applies to claims of race discrimination." Tenn. Br. 11. But even in the race context, the Equal Protection Clause imposes no duty to provide accommodations. In that respect, which is the relevant respect for this case, the Eighth Amendment's prohibition against Cruel and Unusual Punishments imposes on States even more extensive obligations than those imposed by the Equal Protection Clause itself.

And violations of the Eighth Amendment are in another important respect easier to demonstrate than even race-based violations of the Equal Protection Clause.

The Equal Protection Clause requires a showing of intentional discrimination on the part of the State. *See Washington v. Davis*, 426 U.S. 229, 239-248 (1976). This Court has interpreted that requirement as demanding more than simply "intent as awareness of consequences," but instead that the decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (internal quotation marks omitted; quoting *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). By contrast, the Eighth Amendment generally requires a showing only of "deliberate indifference" to a health, safety, or medical need, or another need the denial of which would constitute cruel and unusual punishment. This Court has interpreted that requirement as incorporating a subjective recklessness standard, *see Farmer*, 511 U.S. at 838-840, which asks whether the State had "knowledge of a significant risk of harm," *id.* at 837.[2]

Respondents' invocation of *Turner*, *supra*, is thus inapposite. Claims under the Eighth Amendment and the procedural component of the Due Process Clause are not governed by the deferential *Turner* test. But even under that test, States are required to provide accommodations to inmates with disabilities in some circumstances. *See* Goodman Br. 17-18.

Respondents and their *amici* barely advert to these affirmative obligations imposed on States in the prison context. Nowhere do they deny that the Constitution imposes a duty to provide reasonable accommodation to inmates with disabilities in many circumstances – including those that involve basic sanitary, mobility, and medical

[2] The same point holds even more true for violations of the procedural component of the Due Process Clause. That Clause requires that the "deprivation" of life, liberty, or property be more than merely negligent, *see Daniels v. Williams*, 424 U.S. 327, 330-331 (1986), but no particular state of mind is needed to establish a denial of the constitutionally required process that must attend the deprivation.

needs. There is simply no legitimate penological interest in providing an environment that imposes harsher conditions on inmates with disabilities than upon all other inmates.

2. Respondents contend (at 28) that Title II of the ADA cannot be understood to enforce the Cruel and Unusual Punishments Clause, because that Clause "is not primarily an anti-discrimination command, nor is it aimed just at the class of prisoners with disabilities." That argument ignores the overlap between the ADA's restrictive disability definition and the class of people with "serious medical needs" that require accommodation under this Court's Eighth Amendment jurisprudence. *Estelle*, 429 U.S. at 104; *see* Goodman Br. 39.

More fundamentally, respondents' argument that the ADA enforces only "anti-discrimination command[s]" cannot be squared with *Lane*. The various constitutional components of the "right of access to the courts" at issue in *Lane*, 521 U.S. at 523, were not primarily anti-discrimination commands, nor were they targeted at individuals with disabilities. *See ibid.* (relying, *inter alia*, on the due process and Sixth Amendment rights of criminal defendants to be present at their trials, the due process right of a "meaningful opportunity to be heard" in civil proceedings, and the First Amendment right of access to criminal proceedings by members of the public).

In holding that Title II validly enforces general constitutional rights that do not focus on discrimination, *Lane* recognized a point the Court previously had emphasized, that "Congress had a more comprehensive view of the concept of discrimination advanced in the ADA" than the concept underlying the Equal Protection Clause. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 (1999); *see also Lane*, 541 U.S. at 537 (Ginsburg, J., concurring). Title II's general prohibition against discrimination includes a requirement that States make "reasonable modifications" to their "rules, policies, or practices" where those modifications are essential to ensure that people

with disabilities enjoy the same rights to which others are entitled. 42 U.S.C. § 12131(2); 28 C.F.R. § 35.130(b)(7).

When a State fails to extend a requested accommodation to an inmate with a disability – such as accessible sanitary facilities, appropriate medical treatment, or housing decisions that avoid likely harm to the inmate – and that failure rises to the level of deliberate indifference to the health or safety of the inmate, the Eighth Amendment's requirements overlap with those of the ADA. The statute thus plainly enforces the Eighth Amendment in the prison context – even in cases where there is no discrimination in violation of the Equal Protection Clause.

### B. The Record Of State Violations Of The Constitutional Rights Of Inmates With Disabilities Is Extensive And The Court Should Reject Respondents' Attempt To Rewrite That Record

In their brief and their 71-page appendix, respondents attempt to divide up the evidence supporting Title II's constitutionality into a series of discrete categories and then assert that virtually none of those categories is relevant to the constitutionality of the statute. To the contrary, for the reasons explained below, that evidence is directly relevant.

The Court should not lose sight of the overall picture when sorting through respondents' various objections. No matter how the evidence is sliced, this case involves a legislative and judicial record of constitutional violations that is far more extensive than the record in any of this Court's *Boerne* cases, including *Lane*.

#### 1. The Record of Constitutional Violations Here is Far Greater Than That in *Lane* or *Hibbs*

"In identifying past evils, Congress obviously may avail itself of information from any probative source."

*South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966). State violations of the constitutional rights of inmates with disabilities have been extensively documented in a number of fora, including: (1) congressional hearings dating back to 1969, as well as the hearings of a congressionally-appointed task force considering the ADA; (2) studies and government reports from the mid-1970s until the present day; and (3) dozens of reported judicial decisions. *See* Goodman Br. 20-36. Our opening brief cites 73 judicial decisions in cases implicating constitutional rights in this context, 28 of which found that the constitutional rights of inmates with disabilities had been violated. Goodman Br. 27-36 & nn.14-26. That is "confirming judicial documentation," *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring), that has not been present in any case under the Reconstruction Amendments to come before this Court since at least *City of Rome v. United States*, 446 U.S. 156 (1980) (upholding 1975 extension of the Voting Rights Act).

In neither *Lane* nor *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) – the two cases in which this Court has upheld statutes against *Boerne*-based challenges – was the underlying record of constitutional violations as strong as it is here. In *Lane*, the evidence that States had unconstitutionally denied individuals with disabilities access to the courts consisted of a government report that spoke generally about inaccessible government buildings but did not refer to courts specifically, *Lane*, 541 U.S. at 527; three pages of testimony in a committee hearing on the ADA, *ibid.*; testimony before the congressionally-appointed task force, *ibid.*; and nine reported cases – two of which found constitutional violations, and two of which (a different two) involved physical access to courtrooms, *id.* at 525 n.14.

In *Hibbs*, the Court pointed to hearing testimony and other evidence (mostly discussing the private sector) that employers' paternity leave policies were less generous (on the books and in practice) than pregnancy and maternity leave policies. *Hibbs*, 538 U.S. at 730-732. But there was no evidence that any court had found those practices

unconstitutional – a finding that would have been difficult to make in light of this Court's decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974). *See Hibbs*, 538 U.S. at 749-753 (Kennedy, J., dissenting). The record of constitutional violations here is far stronger than those that the Court found sufficient to justify prophylactic legislation in *Lane* and *Hibbs*.

### 2. The Record of Constitutional Violations Justifies Nationwide Prophylactic Legislation

Respondents' *amici* assert that Title II cannot be upheld in the prison context unless courts had found multiple violations of disabled inmates' constitutional rights in each of the 50 States. Tenn. Br. 16-18, 26-28. But this Court has never held that even a *single* judicial finding of unconstitutionality is required before Congress may enact legislation pursuant to its authority under Section 5 of the Fourteenth Amendment. To the contrary, *Lane* and *Hibbs* upheld nationwide prophylactic legislation on the basis of records that included two (*Lane*) or no (*Hibbs*) prior judicial findings of constitutional violations. *See also Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (unanimously upholding nationwide federal statutory ban on literacy tests); *id.* at 216 (Harlan, J., concurring in part and dissenting in part) ("Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious."); *id.* at 284 (Stewart, J., concurring in part and dissenting in part) ("Because the justification for extending the ban on literacy tests to the entire Nation need not turn on whether literacy tests unfairly discriminate against Negroes in every State in the Union, Congress was not required to make state-by-state findings concerning either the equality of educational opportunity or actual impact of literacy requirements on the Negro citizen's access to the ballot box.")

The record of violations of the constitutional rights of disabled inmates, which touches at least 37 States, *see* Goodman Br. 20-36, is a far more powerful nationwide record than was present in *Lane* and *Hibbs*. Moreover, by taking the accountant-like approach of simply counting the number of cases finding constitutional violations and dividing that number by an estimate of the total population of inmates with disabilities, Tenn. Br. 17, App., respondents' *amici* present a distorted picture of the record. *Amici* count each judicial decision as a single violation, even though a number of the decisions we cite found violations of the rights of inmates with disabilities throughout an entire prison system. *See, e.g.*, *Ruiz v. Estelle*, 503 F. Supp. 1265, 1340-1345 (S.D. Tex. 1980) (finding an array of violations of the constitutional rights of inmates with a variety of disabilities across the Texas prison system), *aff'd in relevant part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Newman v. Alabama*, 349 F. Supp. 278, 284 (M.D. Ala. 1972) (finding violations of the constitutional rights of inmates with mental retardation and mental illness across the Alabama prison system), *aff'd in relevant part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975). And *amici* count as disabled fully a third of all inmates. In so doing, they rely on a definition of disability ("some physical impairment or mental condition") that is far broader than the definition that appears in the ADA. *See* 42 U.S.C. § 12102(2)(A) (requiring not just a "physical or mental impairment," but one that "substantially limits" a "major life activit[y]"); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002) (stating that "these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled").

In comparison to the records in *Lane* and *Hibbs*, the record of constitutional violations here has been documented far more extensively by both Congress and the courts. Whatever one may think of the records in those cases, the charge that States have repeatedly violated the

constitutional rights of inmates with disabilities is, sadly, supported by much "more than conjecture." *Hibbs*, 538 U.S. at 748 (Kennedy, J., dissenting).

### 3. Respondents Ignore *Lane* by Asking this Court to Disregard the Extensive Record of Constitutional Violations That Continued After the ADA's Enactment

Respondents attempt to distract attention from this record by asserting that the Court should not consider entire categories of probative evidence of state violations of the constitutional rights of inmates with disabilities. First, respondents state that evidence developed after Congress enacted the ADA is not relevant. Resp. Br. 20-21, 27, 30-31. Thus, they urge this Court to disregard any judicial decisions or studies announced after the enactment of the ADA that find that States were unconstitutionally treating inmates with disabilities.

Even if respondents were correct on this point, the evidence supporting the constitutionality of Title II in the prison context – including, by respondents' own count, 54 reported judicial decisions during the pre-ADA period – would far exceed the evidence this Court found sufficient in *Lane* and *Hibbs*.[3] But respondents are incorrect as a matter of both precedent and principle.

*Lane* itself relied on evidence developed after the ADA's 1990 enactment, including a 2002 study discussing "the shortcomings of state discrimination statutes," *Lane*, 541 U.S. at 526 n.15, and court-access cases decided in 1993 and 1998, *see id.* at 525 n.14.

*Lane* was correct in refusing to impose respondents' proposed limits on the inquiry into evidence of constitutional violations. In arguing that Title II's constitutionality

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[3] The judicial decisions cited at pages 27-36 of our opening brief, include fully 14 final adjudications of constitutional violation that were rendered prior to the ADA's enactment (12 more than this Court cited in *Lane*).

must be based on the pre-ADA record of constitutional violations, respondents present a caricature of *Boerne*, reading that case as if it imposed some type of "on-the-record" review that treats Congress as if it were an administrative agency or a lower court. But this Court has made clear since *Boerne* that the "congruence and proportionality" test is not an effort to ensure that Congress is diligent in papering the file. Generally, "it is for Congress to determine the method by which it will reach a decision," *City of Boerne*, 521 U.S. at 532, and Congress need not "make particularized findings in order to legislate." *Gonzales v. Raich*, 125 S. Ct. 2195, 2208 (2005).[4] Moreover, it has

[4] Respondents' demand (at 27) that Congress "mention state prisons specifically in the findings undergirding Title II" is inapposite. Congress specifically identified "institutionalization" as one "critical area[ ]" in which "discrimination * * * persists." 42 U.S.C. § 12101(a)(3). This Court in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998), noted that that finding of past and enduring unconstitutional treatment of institutionalized individuals with disabilities can naturally "be thought to include penal institutions." In any event, respondents' argument flies in the face of *Lane*. No congressional finding specifically mentions courthouse access, but the Court nonetheless sustained Title II as applied to that context in *Lane*. There is simply no requirement "that legislation must contain detailed findings proving that each activity regulated within a comprehensive statute is essential to the statutory scheme." *Cf. Raich*, 125 S. Ct. at 2208 n.32; *see also Amicus* Statement of Former President George H.W. Bush 4 ("To be effective in addressing the pervasive discrimination by public agencies, among others, the ADA needed to be cohesive, coordinated, and comprehensive."). Indeed, there is no constitutional basis for requiring Congress to hold hearings, make findings, or publish debates at all. The determination of the means by which Congress will inform itself regarding pending legislation is a core legislative function. *See Buckley v. Valeo*, 424 U.S. 1, 137-138 (1976) (per curiam); *see also Amicus* Br. of Lawyers' Comm. For Civil Rights Under Law 26. And both congressional hearings and published debates were rare throughout the Nation's early history. *See Watkins v. United States*, 354 U.S. 178, 193 (1957) (noting rarity of legislative hearings in 1800's); David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. L. Sch. Roundtable 161, 166 (1995) (noting that in the early congresses, consistent with practice during the Articles of Confederation, Senate deliberations were not

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been a bedrock principle of this Court's jurisprudence since *United States v. Darby*, 312 U.S. 100, 114-115 (1941), that the relevant question in a congressional power case is whether Congress has regulated conduct it has the power to regulate – not whether Congress acted with an appropriate state of mind.

*Boerne* looks not to Congress's decisionmaking process or findings, or to what Congress could have "known," but to the statute Congress enacted. *See City of Boerne*, 521 U.S. at 531 (stating that judicial deference "is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide'") (quoting *Oregon v. Mitchell*, 400 U.S. at 207 (opinion of Harlan, J.)). The *Boerne* inquiry asks whether a statute, as applied to the case before the Court, *see Lane*, 541 U.S. at 530-531, is one that "remed[ies] or prevent[s] unconstitutional actions" or is, instead, one that exceeds Congress's authority by "mak[ing] a substantive change in the governing law." *City of Boerne*, 521 U.S. at 519. To answer that question, what are crucial are the facts in the world, not the facts before Congress – as this Court has recognized. *See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 646 (1999) (stating that a court reviewing a statute under *Boerne* must "identify[] the targeted constitutional wrong or evil" but noting that "the lack of support in the *legislative record* is not determinative") (emphasis added).

Indeed, even when examining legislation under heightened scrutiny to vindicate individual rights protected by the Bill of Rights – scrutiny far more rigorous than that applied under the congruence and proportionality test – the Court has looked to facts outside the legislative "record" in making its determination. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 212-213 (1997)

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open to the public and the House did not provide verbatim transcripts of debates).

(relying on post-enactment evidence); *cf. City of Erie v. Pap's A.M.*, 529 U.S. 277, 297-298 (2000) (upholding local ordinance against First Amendment challenge because city council "may take official notice of such 'legislative facts' within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment"); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 393, 395 (2000) (holding that State had sustained its burden to justify regulation of speech by pointing to an affidavit by a state legislator, two newspaper articles, and four incidents discussed in another judicial opinion).

Limiting the Section 5 inquiry to the facts at the time a statute was enacted would have absurd consequences. If such a limitation applied, this Court's decision to uphold or strike down a statute would turn on the mere fortuity of when it was enacted. If prophylactic legislation were enacted two years before complete documentary evidence of constitutional violations was compiled, for example, this Court would be compelled to strike down that statute even if it would have upheld the very same legislation if it had been enacted two years later. Such an approach would, in effect, punish Congress for prescience.

In short, there is no basis for respondents' assertion that this Court must ignore the widespread evidence of constitutional violations that postdate the ADA's enactment. That evidence could hardly undermine the validity of Title II of the ADA; to the contrary, it underscores the continuing need for prophylactic and remedial legislation in this area. As we demonstrated in our opening brief (at 34-36 nn.24-26), Title II has proved an important means by which inmates with disabilities can challenge violations of their constitutional rights.[5]

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[5] Respondents' *amici* also contend (Tenn. Br. 15 & n.3) that because *some* local jails have been held not to be Eleventh Amendment "arms of the State," this Court should not consider constitutional violations perpetrated in *any* local jail. But of the 73 judicial decisions cited in our opening brief, fully 52 (including 22 final adjudications of constitutional

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### 4. There is No Basis for Disregarding the Documentation of Constitutional Violations in the 1980 CRIPA Legislative Record and the 1983 Civil Rights Commission Report, Both of Which Predate the ADA's Enactment

Respondents also suggest (at 25-26) that this Court should not consider any evidence developed before the two-year period during which the ADA was pending in Congress. In particular, they urge that this Court should not consider the substantial record of violations of disabled inmates' constitutional rights developed in the hearings that preceded enactment of the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA). *See* Goodman Br. 23-24. They also urge that this Court should not consider the 1983 Civil Rights Commission report that specifically listed "[in]accessible jail cells and toilet facilities" and "[a]buse of handicapped persons by other inmates" as discrimination problems faced by individuals with disabilities. U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 168 (1983).

There is no basis for limiting this Court's examination of legislative materials to those during the two years that immediately preceded the enactment of the ADA. The evidence about unconstitutional treatment of inmates with disabilities developed in the CRIPA hearings and the Civil Rights Commission report necessarily informed Congress's subsequent enactment of Title II. "After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Fullilove v. Klutznick*, 448

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violations) involved state prisons or local jails in States where local jails have been held to be "arms of the State." Only five of the judicial decisions cited in our opening brief – and only one of the final adjudications of constitutional violation (*Mitchell v. Untreiner*, 421 F. Supp. 886 (N.D. Fla. 1976)) – involved a local jail that has been held not to be an "arm of the State."

U.S. 448, 503 (1980) (Powell, J., concurring). And this Court in *Lane* relied on the same 1983 Civil Rights Commission report that respondents now urge this Court to disregard. *See* 541 U.S. at 527.

Those sources of information might be less probative if the evidence showed that constitutional violations had abated since the enactment of CRIPA or the publication of the Commission's report. *Cf.* Resp. Br. 24-25 (inferring that Congress thought CRIPA sufficient to solve the problem). But the evidence discussed in our opening brief (at 21-36) demonstrates that constitutional violations continued in prisons following the enactment of CRIPA. The persistent nature of the problem makes the continuing need for national prophylactic legislation especially urgent. *See Hibbs*, 538 U.S. at 730 ("the persistence of such unconstitutional discrimination by the States [after enactment of earlier federal legislation] justifies Congress' passage of prophylactic § 5 legislation").

### 5. The Judicial Decisions That Confirm the Record of Unconstitutional State Conduct Specifically Involve Violations of the Rights of Inmates with Disabilities

Finally, respondents assert that many of the judicial decisions that have found violations of the rights of inmates with disabilities actually involve "prison conditions applicable to all inmates" or "facility-wide deficiencies in medical or psychiatric care," and that those decisions are therefore irrelevant to Title II's constitutionality. Resp. Br. 32-34 (capitalization altered). Respondents are incorrect.

The decisions cited in our opening brief and listed in respondents' appendix at Tables I, III, and IV are cases in which the court found that a State had violated the constitutional rights of disabled inmates specifically by, for example, failing to accommodate their disabilities with appropriate medical or psychiatric care. In these cases, the courts found that state prisons had violated nondisabled inmates' rights as well. In some, the courts found nearly

every aspect of the prison to be constitutionally inadequate. But that does nothing to diminish the fact that in these cases state prisons *also* failed to comply with the obligations that the Constitution imposes on them in dealing with inmates with disabilities. Inmates with disabilities thus suffered twice: once by experiencing the same deficiencies that violated the constitutional rights of *all* inmates, then again by experiencing state conduct that violated the Constitution by failing to accommodate their disabilities.

The two cases that respondents discuss in their brief (at 33) clearly illustrate the point. In *Balla v. Idaho State Board of Corrections*, 595 F. Supp. 1558 (D. Idaho 1984), the plaintiffs broadly "alleged deficiencies in, *inter alia*, the prisoners' nutrition, clothing, and medical care." Resp. Br. 33. The district court concluded that the defendant prison's medical care system as a whole "persistently and predictably fail[ed] to provide adequately for the legitimate medical needs of the prison population" and thus violated the Eighth Amendment. *Balla*, 595 F. Supp. at 1568. But the court found specifically that the prison also had violated the Constitution by providing "[l]ittle or no psychiatric care or assistance" to "inmates who had attempted suicide who obviously were manifesting severe mental and emotional problems" – inmates who would almost certainly have a "disability" within the meaning of the ADA. *Id.* at 1569.

In *Battle v. Anderson*, 376 F. Supp. 402 (E.D. Okl. 1974), the court found an array of constitutional violations, including racial segregation, denial of procedural due process, improper use of chemical mace and tear gas on inmates, inadequate medical care, and other unconstitutional conditions of confinement. Both disabled and non-disabled inmates would be harmed by those violations, but the court also specifically found that the prison had "no professional psychiatric staff" on its rolls to treat inmates "hospitalized for psychiatric reasons" – again, inmates particularly likely to have a "disability" under the ADA.

*Id.* at 415. The fact that the States in these cases *also* violated the rights of nondisabled inmates does not detract from the courts' specific findings that they violated the rights of inmates with disabilities.

The other cases in these categories on which we rely are to similar effect. For example, as respondents note, *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), involved extensive findings of systemwide constitutional violations in the Texas Department of Corrections. *See* Resp. Br. App. 5a; *Ruiz*, 503 F. Supp. at 1390. But the fact that constitutional violations were widespread in the Texas prisons does not undermine the *Ruiz* court's specific findings that the State violated its constitutional obligations to provide "accommodations for handicapped inmates which would enable them more effectively to function and contend with their desperately onerous situations in prison." *Id.* at 1340. The court found that the prisons (including their toilet and shower facilities) were inaccessible to inmates with physical disabilities, thus leaving those inmates to "either manage as best they can, with virtually no special assistance, in physical environments which pose extreme difficulties for them, or spend their days vegetating, denied access to virtually all the programs and activities available to non-disabled inmates." *Ibid.*; *see id.* at 1340-1343. The court also found that inmates with mental retardation were denied accommodations that were essential for them to participate meaningfully in disciplinary hearings, and that prison officials did not protect them from abuse at the hands of guards and other inmates – abuse to which their disabilities made them especially vulnerable. *Id.* at 1344-1345.[6]

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[6] *See also Tillery v. Owens*, 719 F. Supp. 1256, 1259, 1301-1304 (W.D. Pa. 1989) (finding "that nearly every aspect of [the state prison] which we consider here is inadequate, falling far below constitutional standards," but specifically noting the prison's failure to provide adequate psychiatric care to accommodate inmates with "serious mental illness"), *aff'd*, 907 F.2d 418 (3d Cir. 1990), *cert. denied*, 502 U.S. 927 (1991); *Newman v. Alabama*, 349 F. Supp. at 281, 284 (finding generally that Alabama prisons "have fallen far short of supplying the

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These cases thus do not show that the ADA imposes on States obligations that go beyond the constitutional violations they have committed. To the contrary, they show that States have committed constitutional violations that could justify prophylactic obligations that go beyond the disability context addressed by the ADA. But "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955), and Congress "need not deal with all phases of a problem in the same way," *South Carolina v. Katzenbach*, 383 U.S. at 331. The fact that Congress might have had authority to enact broader legislation protecting the constitutional rights of all inmates can hardly suggest that Congress lacked authority to adopt narrower legislation protecting the rights of inmates with disabilities.

### C. Title II Is Reasonable Prophylactic Legislation Because It Is Calibrated To The Prison Context And Provides Appropriate, Limited Remedies

In light of the extensive record of state violations of the constitutional rights of inmates with disabilities, Title II of the ADA is "a reasonable prophylactic measure," *Lane*, 541 U.S. at 533, as applied to prison cases generally. *See* Goodman Br. 37-45.[7] Even if the statute were not valid

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constitutionally required level of adequate medical treatment" and further stating that "[t]he fate of those many prisoners who are mentally ill or retarded deserves special mention" because the State had completely failed to provide any of the psychiatric treatment necessary to accommodate their conditions).

[7] Respondents' *amici* assert (Tenn. Br. 23) that "Title II places the burden of proof on the State." That is incorrect. Title II plaintiffs bear the burden of proving that they have a disability, as that term is defined in the ADA, that they have been denied accommodations, and that those accommodations would have constituted "reasonable modifications" of the defendants' policies and practices. *Cf. US Airways, Inc. v. Barnett*, 535 U.S. 391, 399-402 (2002) (noting similar allocation of the burden of proof under Title I of the ADA). It is only after the

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Section 5 legislation as applied to some prison cases (such as one where the only issue is the denial of an inmate's access to television, *cf.* Resp. Br. 17 n.5), it is plainly reasonable prophylactic legislation, however, insofar as it applies to alleged denials of basic sanitary, mobility, medical, or safety needs or other independently protected constitutional interests. *See* Goodman Br. 44-45 n.27. Respondents' efforts to refute those points are meritless.

1. Respondents and their *amici* first contend that Title II is not valid in the prison context because Congress did not adopt any provisions that are "directed specifically" to prisons, but instead sought to guarantee nondiscrimination and accommodation to people with disabilities generally – even in contexts where disability-based discrimination is subject only to the rational basis test. Resp. Br. 39-41; Tenn. Br. 22. That argument flies in the face of *Lane*. No provision of Title II is directed specifically to courthouse access and the Court nonetheless refused "to consider Title II, with its wide variety of applications, as an undifferentiated whole." *Lane*, 541 U.S. at 530.

Where Congress plainly has the power to reach a case before the Court and adopts a statute that plainly reaches that case, basic principles of judicial restraint prevent this Court from invalidating the statute because Congress also sought to reach other cases in which its power would be less certain. *Lane* therefore held that "[w]hatever might be said about Title II's other applications," the question presented in that case was "not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts." *Id.* at 530-531. So too here, the

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plaintiff has carried that burden that the defendant is required to bear the burden of proving the affirmative defense of fundamental alteration or undue hardship. *See* 28 C.F.R. § 35.130(b)(7); *Olmstead*, 527 U.S. at 606 (plurality opinion) (recognizing fundamental alteration as a "defense" under Title II).

question is not whether Title II is valid Section 5 legislation in all of the applications of its "generally applicable provisions," *cf.* Resp. Br. 41, but whether it is valid Section 5 legislation as applied to state prisons. *See Lane*, 541 U.S. 530-531.

There is no doubt that Title II, by its plain terms, reaches state prisons. *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998). Respondents nonetheless argue (at 22-23) that one of Congress's stated purposes in preventing discrimination – to integrate people with disabilities into the mainstream of social and economic life – is inapplicable to prisons. Even if that argument were relevant, it would ignore the basic fact that most inmates "are eventually released" and they "have the same interest in access to the programs, services, and activities available to the other inmates of their prison as disabled people on the outside have to the counterpart programs, services, and activities available to free people. They have no right to more services than the able-bodied inmates, but they have a right, if the Act is given its natural meaning, not to be treated even worse than those more fortunate inmates." *Crawford v. Indiana Dept. of Corr.*, 115 F.3d 481, 486 (7th Cir. 1997) (Posner, J.).[8]

The ADA's requirement of "reasonable" modifications necessarily takes account of context – including, in the prison setting, "[s]ecurity concerns, safety concerns, and administrative exigencies." *Love v. Westville Corr. Center*, 103 F.3d 558, 561 (7th Cir. 1996). Respondents suggest that Title II's reasonableness language is insensitive to this context. Resp. Br. 40. But that suggestion is puzzling

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[8] Respondents suggest (at 20, 22-24, 28-29) that Title II's general language leaves some doubt about whether Congress intended to abrogate state sovereign immunity in prison cases. (In making that suggestion, respondents incidentally violate their own rule by pointing to a congressional speech made five years *after* the ADA's enactment. Resp. Br. 28.) But the ADA unambiguously abrogates Eleventh Amendment immunity from suit, without excluding any class of cases from that abrogation. 42 U.S.C. § 12202.

in light of this Court's precedent, which has read the far more stringent "compelling governmental interest" language in the Religious Land Use and Institutionalized Persons Act to account for the unique imperatives of the prison context. *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2123 (2005); *see* Goodman Br. 40-41. By using the language of reasonableness in Title II, Congress gave the courts both the power and the duty to "carefully calibrate[]," Resp. Br. 40, the statute's application to the prison context. To read the statute, as respondents urge, to invite a constitutional question would be inconsistent with the exercise of "the gravest and most delicate duty that this Court is called on to perform" – the duty to determine whether an Act of Congress violates the Constitution. *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.).

2. Respondents also contend (at 44) that Title II is disproportionate because it does not require plaintiffs to show deliberate indifference. But of course it is in the nature of prophylactic legislation to "prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the [Fourteenth] Amendment's text.'" *Lane*, 541 U.S. 533 n.24 (quoting *Kimel v. Florida Board of Regents*, 528 U.S. 62, 81 (2000)). Given the extensive record of state violations of the constitutional rights of inmates with disabilities, dispensing with the deliberate indifference requirement is a congruent and proportional response here. *See id.* at 520.

Moreover, the differences between the ADA's accommodation requirement and the Eighth Amendment's deliberate indifference test should not be overstated. Where individualized accommodations are concerned, Title II's requirement of "reasonable modifications," 42 U.S.C. § 12131(2); 28 C.F.R. § 35.130(b)(7), is not triggered until an individual with a disability requests an accommodation. That request will put the State on notice of the disability and the need for accommodation. If the State denies the accommodation in the face of that request, the denial would likely meet the deliberate indifference

element of the Eighth Amendment. *See Farmer*, 511 U.S. at 846-847 & n.9. And of course any request for damages under Title II will be subject to the very similar "deliberate indifference" standard that applies to damages actions under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, pursuant to *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-291 (1998); *see Barnes v. Gorman*, 536 U.S. 181, 184-185 (2002) (ADA Title II incorporates the remedies of Title VI and Title IX, including the limitations on those remedies). Any differences between the constitutional deliberate indifference test and the statute's requirement of reasonable modification are therefore minimal in this context.

3. Finally, respondents and their *amici* contend that, whatever the validity under Section 5 of Title II's *substantive* requirements, a damages remedy is unnecessary and disproportionate to constitutional violations given the availability of the Section 1983 cause of action against officials in their individual capacities. Resp. Br. 29; Tenn. Br. 24-26. That argument rests on a misreading of *Boerne*. The "congruence and proportionality" test is a means of determining whether Congress has exceeded its remedial power by seeking "to decree the substance of the Fourteenth Amendment's restrictions on the States." *City of Boerne*, 521 U.S. at 519-520. It does not limit Congress's unquestioned power to determine the remedies for violation of an otherwise constitutional statute. Where the substantive obligations that Congress has imposed on the States satisfy the congruence and proportionality test, nothing in Section 5 demands an additional showing to justify a damages remedy to enforce those obligations. Nor does anything in the Eleventh Amendment demand such a showing. This Court's decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), makes clear that, so long as Congress has Section 5 power to impose a given substantive rule on the States, the Eleventh Amendment does not limit the power of Congress to impose any remedy, damages or otherwise, for a violation of that rule. *See id.* at 456 (Eleventh

Amendment no obstacle "[w]hen Congress acts pursuant to § 5").

These points hold particularly true where the remedy authorized by Congress consists merely of compensatory damages, as it does here. *See Barnes*, 536 U.S. at 188 (punitive damages not available under Title II of the ADA). Compensatory damages create the proper incentives for entities to comply with the law without the need for litigation. *Cf. McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) ("Congress designed the remedial measures in these statutes to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination. Deterrence is one object of these statutes.") (citations omitted). Absent the availability of at least compensatory damages, an entity loses nothing when it drags its feet until suit is brought – and it gains the benefit of the fact that such a suit may never be brought.[9] Damages are also "a traditional form of compensation for invasion of a legally protected interest." *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388, 408 (1971) (Harlan, J., concurring). Having properly adopted a substantive rule of law to enforce the Fourteenth Amendment – based on an extensive record of violations of the constitutional rights of inmates with disabilities – Congress was surely entitled to authorize the most basic of damages remedies for violating that rule.

And despite respondents' claim to the contrary (Resp. Br. 10 n.2), this case is not solely about the availability of damages. Although the Eleventh Circuit permitted the ADA claims to continue against the state officials in their official capacities for injunctive relief, the court did not

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[9] Where only injunctive relief is available, a State may not even be liable for attorneys' fees if it waits to comply with the law until suit is brought, so long as the State's eventual compliance moots any continuing equitable claim. *See Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

address (and in the companion case of *Miller v. King*, 384 F.3d 1248, 1268 n.23 (2004), expressly reserved), respondents' argument made in the district court that the ADA was not a valid exercise of Congress's Commerce Clause authority. Goodman Br. 45 (quoting Dt. Ct. Dkt. 31 at 7). If that argument were to be sustained, and this Court were to rule here that the ADA is not proper Section 5 legislation in this context either, the statute could not support any relief – damages or an injunction – against any of the respondents.

Although respondents' current concession (Resp. Br. 10 n.2) regarding petitioner Goodman's "right to pursue" (and presumably obtain) injunctive relief is welcome, respondents' *amici* make no such concession. There is every reason to believe that if this Court holds that Title II exceeds Congress's Section 5 power in the prison context, States throughout the nation will immediately challenge the Commerce Clause basis for the statute in that context as well. Indeed, thirty-three States (including Georgia and Tennessee) have previously argued to this Court that "Congress lacks authority under the Commerce Clause to apply the ADA in the context of state prisons." Brief of *Amici Curiae* Nevada *et al.*, at 7, in *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998) (capitalization altered); *see also* Brief of *Amici Curiae* Virginia *et al.*, at 17, in *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005) (brief of 8 States urging that Religious Land Use and Institutionalized Persons Act was not valid Commerce Clause legislation because "a State's operation of its prisons has little or no impact on interstate commerce"). If that argument were to prevail, Section 5 would provide the only basis for applying the ADA at all in the prison context, regardless of the relief a plaintiff seeks.[10]

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[10] Nor do respondents suggest that any state law claim exists for petitioner Goodman to obtain either injunctive relief or damages. *See also Amicus* Brief of National Disability Rights Network 29 (citing a 1984 Georgia Attorney General opinion that concludes that state law

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Respondents' *amici* contend that a damages remedy is improper in the prison context because of the problem of "vexatious prison litigation." Tenn. Br. 25 n.7. But that is an argument properly directed to Congress, *see Crawford-El v. Britton*, 523 U.S. 574, 601 (1998) (Kennedy, J., concurring), and indeed, it is one that Congress has addressed. As pointed out in our opening brief (at 42-43), the Prison Litigation Reform Act (PLRA) imposes significant limitations on the ability of inmates to bring Title II money damages suits. Although *amici* suggest (at 25) that the PLRA has not fully eliminated the burden of inmate litigation – a suggestion that, again, would be properly addressed to Congress – the facts do not support *amici's* argument. Since the PLRA took effect, there has been a "dramatic" decrease in the filing of federal-court complaints by inmates, with a drop of thirty-three percent in the first year of the statute's implementation alone. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1634 (2003); *see id.* at 1584, fig. I.A. Thus, even if it were this Court's province to add to the limitations that Congress has already imposed on inmate litigation, there would be no need to do so. *See Crawford-El*, 523 U.S. at 596-597.

## II. TITLE II IS APPROPRIATE REMEDIAL LEGISLATION AS APPLIED TO THE RECORD OF THIS CASE

Finally, respondents contend, as did the court of appeals, that Title II cannot be valid Section 5 legislation as applied to this case or *any* prison case unless it is valid Section 5 legislation as to *all* prison cases. Resp. Br. 42-44. But although *Lane* upheld Title II as applied to an entire

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requiring government buildings be physically accessible to people with disabilities does not apply to jail cells); *see also id.* at 28-29 (citing other state statutes and cases that exclude inmates from protections of state disability antidiscrimination laws).

"class of cases" in the context of access to the courts, 541 U.S. at 531, the Court at the same time reaffirmed the principle that "'if the *complaint* here called for an application of the statute clearly constitutional under [Congress's enforcement power], that should have been an end to the question of constitutionality,'" *id.* at 531 n.19 (quoting *United States v. Raines*, 362 U.S. 17, 24-25 (1960)) (emphasis added). Thus, even if the ADA were not valid *prophylactic* Section 5 legislation at all in the prison context, it is valid *remedial* Section 5 legislation on this record where the State's alleged violation of Title II also would violate the plaintiff's constitutional rights. *See* Goodman Br. 45-50.[11]

Respondents assert that the *Raines* principle does not permit the congressional power analysis to be conducted on a case-by-case, as-applied basis. But *Raines*'s own language rejects that reading, as does the square holding

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[11] Respondents contend (at 41-42) that this argument is not "fairly included" within the question on which the Court granted *certiorari*, because that question speaks of "discrimination by state-operated prisons," and the Eighth Amendment claims here are not claims of "discrimination." Respondents again ignore that Title II treats the failure to accommodate disabilities as "discrimination." *See* pp. 6-7, *supra*. The State's alleged failure here to accommodate an inmate with a disability would constitute "discrimination" under Title II of the ADA, and it also would violate the Eighth Amendment. The petition for *certioriari* made clear (Goodman Pet. 11-14, 17-19) that the determination whether the ADA validly abrogates state sovereign immunity in a case where the defendant's alleged ADA violations also would violate the Constitution was included in the question presented, which asks "[w]hether, *and to what extent*," Title II validly abrogated state sovereign immunity in the prison context. Goodman Pet. *i* (emphasis added). Indeed, the petition emphasized that the opportunity to decide whether the ADA is constitutional as applied to alleged conduct that itself would violate the Constitution made this case a particularly good vehicle for *certiorari*. Goodman Pet. 20. Furthermore, the United States' petition for *certiorari* in No. 04-1203, in which Goodman is a respondent under this Court's Rule 12.6, does not use the term "discrimination," but asks whether the ADA was valid legislation "as applied to the administration of prison systems."

of *Griffin v. Breckenridge*, 403 U.S. 88, 106 (1971), which engaged in a fact-intensive, case-specific analysis to uphold the constitutionality of 42 U.S.C. § 1985(3) insofar as it applied to "the private conspiracy alleged by the complaint in [that] case." *Griffin*, 403 U.S. at 104.

Similarly, in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), this Court engaged in the same as-applied approach in assessing the constitutionality of Section 4(e) of the Voting Rights Act of 1965, which provided that all persons who completed the sixth grade in an accredited public or private school in which the language of instruction was other than English could not be excluded from voting for failure to read or write English. *See id.* at 644 n.1. The Court limited the "scope of [its] inquiry" to the provision's validity as applied to persons who had completed the sixth grade in schools in Puerto Rico and were barred from voting by New York State's literacy requirement. *Id.* at 645 n.3. The Court held that "*in the application challenged in these cases*, § 4(e) is a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment." *Id.* at 646 (emphasis added).

As the court of appeals itself recognized, many of the allegations in this record would establish a violation not just of Title II of the ADA but also of the Constitution itself. As applied to those allegations, Title II clearly provides a remedy for actual constitutional violations, and this Court's conclusion in *Griffin* is equally apt here: "[S]ince the allegations of the complaint bring the cause of action so close to the constitutionally authorized core of the statute, there has been no occasion here to trace out its constitutionally permissible periphery." 403 U.S. at 107.

## CONCLUSION

For the reasons set forth above and in our opening brief and the briefs of the United States, the judgment of

the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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